Supreme Court of Florida

INQUIRY CONCERNING A JUDGE SC CASE NO.:95,886
MATTHEW E. McMILLAN, CASE NO.: 00-703

99-10 AND and No. 00-17

MATTHEW E. McMILLAN'S RESPONSE TO ORDER TO SHOW CAUSE

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SUMMARY OF ARGUMENT

As to each charge Judge McMillan contends that there was not clear and convincing evidence of wrongful intent and, alternatively, that each offense proven by itself or in combination with another or other offenses is not supportive of the punishment of removal from the bench.

CHARGE 1

Judge McMillan regrets sending the letter to law enforcement.

It was sent to only a small group of police officers. The campaign benefit to the candidate would have been very slight at the most in view of the law enforcement endorsements received by the incumbent.

CHARGE 3

Part I- Contrary to the Panel findings, the campaign literature in question did not say that incumbent Judge Brown pressured Sheriff Wells. There was no clear and convincing evidence that Judge McMillan made any misrepresentation that the incumbent pressured Sheriff Wells, nor that there was a knowing intent to mislead.

Part II- There was no clear and convincing evidence of a false assertion by candidate McMillan since there was testimony in the record supporting the allegation that the incumbent pressured law enforcement for special treatment of his family.

CHARGE 4

The candidate's letter that he would always have the heart of a prosecutor was sent to the State Attorney as a personal letter and was not intended for the campaign public. The copy of the letter sent to a newspaper reporter was not intended for the campaign public and was not published.

CHARGE 5

The County's fine and court cost collection deficiencies were subject to fair comment. The incumbent's name was not mentioned in the brochure.

CHARGE 6

An incumbent's work ethic is subject to legitimate campaign comment.

The literature in question was consistent with the incumbent's reputation. The intent of the campaign literature was to compare the incumbent's time in court with other judges. Candidate McMillan attempted to correct a misleading statement concerning an over-loaded court system and partially succeeded as to a television ad. Contrary to the Panel findings, candidate McMillan never asserted that the incumbent took excessive vacation time. The supposed effect of the literature on the campaign is political speculation on the part of the Panel and contrary to the evidence in the record pertaining to effective campaign methods. Judge McMillan is, however, remorseful as to the use of the language capable of misinterpretation , i.e.,"days off from court", as attributed to the incumbent in the attempted conveyance of the statistical message based on the McMillans' voluminous research.

CHARGE 7

As stated above under Charge 6, Judge McMillan attempted too late to correct the flyer containing the statement as to the overloaded court system, but did timely correct and remove the offending language from the television spot. The dissemination of the flyer became unintentional as to the candidate personally, but of course he was responsible for the acts of the people working in his campaign.

CHARGE 8

There was no clear and convincing evidence that candidate McMillan misrepresented the incumbent's sentencing practices as to prostitution. Judge McMillan was not charged with making an incorrect statement of the law, which became the focus of the Panel rather than the offense charged. Had Respondent's Motion For More Definite Statement been granted, the matter of the existence or not of a relocation statute or policy for prostitutes could have been litigated rather than the subject of a post-trial supplement filed by Respondent. In any event, there was only an implication that the incumbent might not have been using such law or policy, if one existed, not any direct statement that the incumbent was disregarding a law.

CHARGE 9

Judge McMillan accepted responsibility for the mistake made in using one particular sentenced-defendant's name. However, the statistics supported the point to be made.

CHARGE 10

Candidate McMillan's brochure was a fair and reasonable response to the incumbent's brochure claiming a tough stance on crime and using the same statistics as appeared in the incumbent's brochure. The brochure could not have

mislead the public as to the effect negotiated plea agreements have on the number of criminal cases, irrespective of the judge assigned (as charged), because the point is too arcane for the voters.

CHARGE 11

There were not specific major incidents or such an accumulation of small incidents as to indicate a pattern of hostile conduct unbecoming a member of the judiciary. The method of prosecution attempted to show an accumulation of offenses by dividing incidents. The police officer letter was divided and stretched into charges 1, 2, and 3. Charges 6 and 7 were based on a single piece of literature. Charges 8 and 9 stem from a single document.

Since there was doubt that Judge McMillan intentionally committed serious and grievous wrongs of a clearly unredeeming nature, he should not be subjected to the extreme discipline of removal.

THE OCURA MATTER

Judge McMillan is remorseful as to his involvement in the Ocura first appearance, since he was a witness to Ocura's erratic driving which resulted in a DUI arrest. However, the Judge first properly referred Ocura's case to another judge. But then, when the Assistant State Attorney made it known that Ocura was a menace to society because of numerous DUI convictions, Judge McMillan did set a bond on

Ocura until another judge was to review the case the next day. Upon consideration of the record of the Ocura first appearance it is obvious that Judge McMillan had no ulterior purpose in taking the docket for Judge Farrance that related to Ocura. There was no showing of an "Ocura" agenda, or any bad purpose which would contradict Judge McMillan's expressed ingratiating motivation for offering to take Judge Farrance's docket.

STATEMENT OF THE CASE AND FACTS

Respondent Matthew E. McMillan was charged with thirteen violations of the Florida Code of Judicial Conduct. Eleven of the charges arose from the Respondent's 1998 election campaign against an incumbent County Judge in Manatee County. Two charges related to Respondent's conduct after he was elected.

A settlement of the election case was previously agreed upon by the Prosecution and Judge McMillan on the day before the case was initially set to be

heard by the Hearing Panel. As a result, that hearing was canceled. A formal stipulation containing admissions of guilty and an explanation for the settlement was filed by the Investigative Panel in the Florida Supreme Court on January 17, 2000. The recommendation was for a six month suspension without pay and a public reprimand with Judge McMillan to remain in office. The proposed settlement drew criticism from various factions appearing as amici in the Florida Supreme Court. The local judges and a group of attorneys became involved in the controversy and filed as amici opposing disposition of the matter without a full hearing. At least one citizen's group came to the defense of Judge McMillan.

The Ocura and Lohrey charges were then filed by the Investigative Panel on March 31, 2000, in advance of any action by the Florida Supreme Court on the election case. On June 21, 2000, the Florida Supreme Court entered its order determining that the recommended and agreed upon settlement in the election case should be rejected. The Court's order returned the election matter to the JQC "for further proceedings on the merits of the issues of misconduct as well as the appropriate discipline." This order also allowed amicus to seek leave to participate in the hearing.

After this order by the Florida Supreme Court, the election case, the Ocura case and the Lohrey cases were all consolidated by an agreed order of July 26, 2000, entered by the JQC Hearing Panel.

After a hearing on October 30th through November 2, 2000, the Hearing Panel of the Judicial Qualifications Commission entered its Findings, Conclusions and Recommendation on January 10, 2001, Respondent was found guilty on ten of the election charges and on one of the separate charges while on the bench. He was found not guilty of election Charge 2 and the Lohrey matter. The Panel recommended removal from office.

The proceedings before the Judicial Qualifications Commission (hereinafter, the JQC) reflect the undisputed facts as follow. Judge McMillan has been an attorney since 1991 (T.111). Prior to that he had been a police officer in the City of West Palm Beach. Upon graduation from law school, Judge McMillan began as a misdemeanor prosecutor with the Office of the State Attorney, Earl Moreland, in Sarasota (T.111). He was subsequently promoted to the felony division. It was while prosecuting that Judge McMillan met his future wife, who was a victim of domestic violence. It was through his interaction with her that Judge McMillan began to realize the import and impact of domestic violence on our society.

Judge McMillan left the Office of the State Attorney for private practice and opened a criminal defense practice (T.111). It was during this time that Judge McMillan, having heard firsthand the destruction that drugs and alcohol cause in families and the children of those families, began to become interested in substance abuse issues. Judge McMillan took it upon himself to become a Certified Criminal

Justice Associate Addictions Professional. Judge McMillan, and most mental health professionals, are of the opinion that domestic violence and substance abuse are the most serious social problems facing our society today.

In addition to opening his private law practice, he co-founded the Domestic Abuse Intervention Project in 1994. This was the very first state-certified batterer's intervention program. It was through his many years experience in the criminal justice system that Judge McMillan noticed an alarming trend in the system concerning the manner in which the local county judges dealt with domestic batterers and substance abusers (T.1142). Judge McMillan, as well as many other victim advocates, community organizations, and mental health professionals, attempted to persuade the local judiciary to handle these matters in a more serious and effective manner. Since the Judge felt that these attempts were largely ignored, he decided to run for county judge. In doing so, Judge McMillan intended to use the insight he had gained as a police officer, prosecutor, defense attorney, domestic violence facilitator and addictions professional to criticize the system and offer solutions.

After deciding to run, Judge McMillan was met with a hostile and virulent attack against himself and his family. Before he even publicly announced his intention to run, Judge McMillan was visited at his law office by Paul Sharff, then vice-president of the Republican Executive Committee, and business partner of

Sheriff Charlie Wells' wife (T.124). Sharff made it perfectly clear that he was sent on behalf of certain members of the judiciary to deliver a message that Judge McMillan should reconsider his decision to run against an incumbent judge. They were afraid that Judge McMillan would start a trend of lawyers challenging sitting judges. He described to Judge McMillan the "horrible," "down and dirty" tactics he could expect if he did not withdraw his candidacy, including the planting of drugs, the tapping of his telephones, and the destruction of his and his wife's businesses and reputations. Many of the alarming threats materialized. Notably missing from the findings of the JQC is the voluminous amount of evidence concerning the present fitness of Judge McMillan and the improvements and innovations he has instituted while on the bench, all of which is inconsistent with the recommendation of removal.

In its findings the Panel cites no witness that was of the opinion that Judge McMillan was presently unfit to hold office. On the contrary, there were a string of witnesses called on behalf of Judge McMillan that opined that he was fit and that the innovations that he brought to the bench were improvements, were much needed, and were successful. Other facts are necessarily included in the Argument portion of the Brief.

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ARGUMENT

Judge McMillan's issue for review herein is the contention that, as to each of the ten charges upon which he was found guilty by the JQC:

THE JUDICIAL QUALIFICATIONS COMMISSION ERRED IN FINDING GUILT BY CLEAR AND CONVINCING EVIDENCE OR ALTERNATIVELY THE OFFENSE IN ITSELF OR TAKEN WITH OTHERS IS NOT SUPPORTIVE OF THE PUNISHMENT OF REMOVAL FROM THE BENCH

STANDARD OF REVIEW

The Court stated ***In re McAllister***, 646 So.2d 173 (Fla.1994), the following: "It is this Court's responsibility to review the Commission's findings and ascertain whether they are supported by clear and convincing evidence".

CHARGE 1

The substance of this charge is a letter Judge McMillan wrote to a select group of law enforcement officers after being denied all opportunity by Sheriff Charlie Wells to address the Manatee Sheriff's Office employees, contrary to established policy for judicial candidates (T. 387), and even the right to seek the endorsement of the Fraternal Order of Police, an organization to which he had once belonged (Exhibits 100, 101). When the letter is read in its entirety, Judge McMillan's frustration over 1) the Sheriff's and the FOPs unexpected endorsement of his opponent (Exhibit 94), his opponent's claim that the Sheriff's Department had endorsed him (T. 386), and 3) his denial of an opportunity to address this constituency through a fair and meaningful access (T. 885) is self-evident. Also self-evident is Judge McMillan's sincere regret and his recognition that this letter was a grave error in judgement.

Contrary to the overall JQC finding of no "genuine remorse" on the Judge's part, Judge McMillan testified as follows:

> "There's no question that I should not have written that letter. I've admitted to it and I'll take responsibility for it. I wrote that letter in anger. I understand the appearance it gives you. And I don't dispute that certainly somebody could read that letter and possibly get the impression that I would be pro law enforcement. I did that in response to a huge flyer we had over here where he lists all of his

endorsements. I wrote that thing kind of in frustration and anger. I wish I had done what my dad told me to do and wait a couple of days and then send it." (T.1414)

"I think this letter is probably the most unfortunate thing I did during my campaign." (T. 116)

"I wrote this letter and sent it, and quite frankly, I wish I had never done that." (T. 117)

The JQC findings here are a "scissors and paste-pot" production. When the Judge testified to the effect that "things happen very fast in a political campaign" (T.1406), *he was not talking about this letter*. Yet the JQC most incorrectly cites that testimony at T.1406 as testimony specifically relating to this letter. Though it's possible for an agency or a court to be right for the wrong reason, this misrepresentation alone nevertheless should cause the Court to look askance at the composition of the entire JQC report. It may no longer be a jury instruction, but the old doctrine "*falsus in uno, falsus in omnibus*" is applicable here.

Though the letter caused regret, an interesting basis-for-political speech question arises as to the JQC finding and criticism that Judge McMillan had no

"*personal*" knowledge of pressure and calling in of favors by incumbent Judge Brown. Judge McMillan did have, however, reliable hearsay to the latter effect from the visit of political activist Paul Scharff (T.124). And that goes to intent. Did he really misrepresent the "true facts" about pressure from Judge Brown, as the JQC stated (P.19)? What is the truth? That Judge Brown did not do that, despite what Scharff said, because of Judge Brown's testimony? Or is it that Judge McMillan's lack of "personal knowledge" and reliance on hearsay cannot show truth? The JQC panel can decide matters in factual dispute, but the latter disputed finding, particularly as intent in involved, is not the thrust or crux of Charge 1 in any event.(See Charge 3 re pressure by Judge Brown).

As to the charged predisposition in the letter to favor ("go to bat for") the police, the Judge's testimony (T.114,115) and that of others (Deputies Britt and Atkinson, T.1350; T.716) shows a proper intent . The letter was not meant for the public in general; it was sent to a small group of police officers (T.117), though they admittedly are voters. But the benefit here to Judge McMillan would be slight at most. See, ***In re Alley,*** 699 So.2d 1369(Fla.1997).

CHARGE 3

CHARGE 3 , Part I:

You falsely or misleadingly asserted that your opponent, Judge George Brown, the incumbent asserted pressure upon Manatee County Sheriff Charlie Wells not to support you…..

First, the literature never says that *George Brown pressured Sheriff Wells*. It simply states that Wells was pressured. There was no clear and convincing evidence that the statement about Sheriff Wells was made falsely or with an intent to mislead. The panel chose not to credit the testimony of Judge McMillan and his wife as to their conversations with Sheriff Wells, which certainly would have supported the proposition that Sheriff Wells had pressure. (T.881-895; T.1230). Shortly after his meeting with Sheriff Wells, prior to the formal announcement of his candidacy, Judge McMillan testified that he and his wife (a licensed psychotherapist and Certified Addictions Professional) were paid a visit by Mr. Paul Sharff, who was vice-president of the Republican Executive Committee and the business partner of the wife of Sheriff Charlie Wells. He later became a campaign advisor and fund-raiser for George Brown. (T. 1224)

Judge McMillan testified that initially Mr. Sharff had approached Judge McMillan pledging his support, then returned to Judge McMillan's office unexpectedly a week later, asked Judge McMillan to go get his wife, and then explained to the two of them that he could no longer support Judge McMillan. As

a matter of fact, unless Judge McMillan dropped out of the race, "horrible things" would happen to him and his family. Judge McMillan testified that Mr. Sharff went on to explain that:

> "Judge Brown [had] been calling in favors, that pressure [was] being exerted on him by other people in the community to support Judge Brown; that [McMillan] wasn't running against Judge Brown, [he] was really running against all the judges." (T. 124-5). McMillan testifies that Sharff told him if McMillan did not drop out, "they're going to spread rumors about you, they're going to say that your wife is a cocaine addict, that you were a bad police officer, that you were fired from the police department, that you beat people up as a ---you were fired for police brutality, that you stole a gun from the police department, that they would run Susan out of business and they were going to report her "cocaine problem" to the people that she bills insurance companies with. They were going to run me out of business, that we'd never work in Manatee County again, that weren't running against George Brown, we were running against all the judges, because they were afraid we'd start a trend….He said that they would plant evidence; they would either plant drugs in our car to have us arrested or to embarrass us. They would do whatever they could do

to make it a point that you don't run against an incumbent judge here. …**He said that tremendous pressure was being exerted on Charlie Wells and himself to support George Brown**; …And he talked about the good ole boys…They're going to crush you, and you'll have to leave town." (T. 1222 - 26) *(emphasis added)*

Scharff's deposition (Ex.326) shows his invocation of the 5th Amendment regarding questions about his visit to the McMillans, including questions about pressure by the incumbent and threats made.

Much technicality and hair-splitting, which each entity, Judge McMillan and the JQC, attributes to the other, serves to obfuscate the intent of the Judge, which is certainly a detriment to his effort to avoid removal from office, the capital punishment for violation of these sanctioned restrictions upon freedom of speech in a political campaign. There is no clear and convincing evidence that Judge McMillan made any misrepresentations with regard to Sheriff Wells being pressured, nor that such were made knowingly with intent to mislead.

CHARGE 3, PART II

"You asserted that Judge Brown had pressured law enforcement officers for preferential treatment for his children when they were arrested."

It was shown that at least one officer had indeed come to Judge McMillan with information concerning an investigation involving a child of Judge Brown (See testimony of Deputy Dawn Atkinson referenced below). If the Panel does not believe the police officer's testimony, should that mean Judge McMillan is guilty of a knowing misrepresentation.? The JQC described the testimony of Deputy Atkinson (p.21 of Report): "Atkinson then received a phone call from Judge Brown and her 'impression' was that Judge Brown spoke in a demeaning tone of voice to her *and that he was seeking special treatment*"(T.712,713). The *mere fact of such a call* from a judge to a deputy is pressure. How the JQC then concluded that Judge McMillan had "*no reasonably reliable information*" that Judge Brown had exerted pressure on law enforcement defies reason and common sense, besides being contrary to the experience of many of us both of the bench and the bar.

CHARGE 4:

Re: The letter to State Attorney that he would "…*always have the heart of a prosecutor*"..

The substance of this charge derives from a letter which was sent to State Attorney Earl Moreland. The Hearing Panel misstates the record to the Court by stating "*there is no question that these campaign messages were conveyed to the*

public or to at least a substantial number of persons. A copy of the letter to State Attorney Moreland was sent to a local newspaper (T. 132).”

A review of the actual testimony and exhibits demonstrates the opposite. Judge McMillan explained that he wrote the letter to his former employer on personal stationary (not campaign letterhead) to clear the air concerning rumors Judge McMillan had been told were circulating. (T. 129) Judge McMillan submits that the statement must be read in the context of the paragraph and the context of the letter in which it was written. He testified:

> “The paragraph begins with ‘The knowledge that I gained during my stay at the State Attorney’s Office was invaluable. I loved prosecuting and might have stayed on had I not had a family to support and huge student loans to pay off. I believe I will always have the heart of a prosecutor.’ I loved that job. I loved prosecuting.. And that’s what the context of it was, to say although I loved working for you, don’t believe the things you hear about me badmouthing you. And I think [Mr. Moreland’s] deposition reflects that’s how he took it.” (T. 130)

Indeed Earl Moreland testified as follows:

> "I really didn't pay that much attention to that phrase or that letter to form any kind of opinion or intent. I thought the letter was written to me because of some rumors that had been circulated about perhaps Mr. McMillan making some derogatory comments about the office. I think the majority of the letter went to that." (T. 1337).

When asked why he sent a copy of the letter to the newspaper, Judge McMillan explained it was sent, as background material only, to a specific reporter, Jose Luis Jimenez, who was researching an article on the "good ole boy network" and its relation to judicial politics. (See Exhibit 1 – Newspaper Article entitled *Unwritten rule: Don't challenge incumbent* by Jose Luis Jimenez, Exhibit 3 – *Judge Claims Firing was Revenge*" by Jose Luis Jimenez, and Exhibit 4 – *Judge's Firing Attributed to Finances* by Jose Luis Jimenez.) The reporter asked if McMillan had experienced similar tactics as Judge Rick DeFuria, who also reported being pressured into dropping out of a judicial race against an incumbent judge. McMillan faxed the reporter personally a copy of this letter along with a number of related items as background material only. The letter was never intended by Judge McMillan to be distributed to the public. The letter was never published and is therefore, not capable of "eroding public confidence in the integrity and impartiality of the judiciary." (T. 132 - 134).

Exhibit 178 is the actual fax cover sheet to which this letter and five other items related were attached when sent to Mr. Jimenez. It is perfectly clear from the exhibit why the letter was sent to this reporter, and that there was no intent on Judge McMillan's part to convey to the public any predisposition toward the prosecution. In order for the Panel to conclude otherwise, they had to simply ignore the evidence.

Insofar as the allegation re "rubber stamping" of plea deals is concerned, on page 23, the Panel mischaracterizes Judge McMillan's testimony by implying that his explanation ,for writing Earl Moreland and his intention behind the statement he would "always have the heart of a prosecutor" , is untruthful because he includes statements that "defense attorneys would be unhappy with him as a judge." What the Panel fails to inform the Court is that nowhere in the letter to Earl Moreland does Judge McMillan make any reference to statements about defense attorneys being unhappy with him as a judge or the "rubber stamping" of plea deals. The accusations in this portion of the charge are unsupported by any documentation or specific instances where this occurred.

The above statements do appear in a separate exhibit, JQC #5, which is the basis of Charges 8 and 9. The JQC should not take statements made in JQC Exhibit 5 out of context, and make it appear as if those statements are actually

found in the letter to Earl Moreland in an effort to give a sinister and unintended meaning to Judge McMillan's *heart of a prosecutor* statement.

Notwithstanding the objection, Judge McMillan discussed JQC Exhibit #5 in response to questioning from Mr. Barkin. This document was not distributed to the voting public, but to eight members of the editorial board, who had a chance to ask questions of both candidates and review the materials in their entirety. The statements, when placed in context, do not convey favoritism toward the prosecution, but rather a commitment to fairly and impartially perform the duties of the office. Placed in context, the paragraph in Exhibit 5 reads "I will not rubber stamp the deals the prosecutors and defense attorneys work out. I suspect defense attorneys will be unhappy with me as a judge. Justice in my courtroom will depend on the nature of the crime and the defendant's criminal history."

While this phrase in its proper context is not incompatible with the faithful and impartial performance of the duties of the office, (T. 159 – 160), Judge McMillan conceded several times that he wishes he had not made that statement because he now recognizes it is subject to misinterpretation. (T. 159-160). He went on to explain that he believes that a judge who accepts, rather than scrutinizes, whatever plea deal comes before him is abdicating his responsibility .

The Hearing Panel concludes Judge McMillan affirmatively led voters to believe he would be *pro-police and pro-prosecution*. It further concludes "*there is*

no question -- Judge McMillan intended to convey his 'heart of a prosecutor' rhetoric to more than a select few at the State Attorneys offices." Even if Judge McMillan's statements, when misinterpreted or taken out of context, constitute a violation, it is contrary to the evidence for the Panel to hold that Judge McMillan led voters to believe he was pro-police with the statements in question. The evidence clearly shows that Judge McMillan's letter to Earl Moreland was <u>personal</u> in nature. It was not directed to any other members of the State Attorneys office, as the Panel suggests, <u>nor was it intended to reach the voting public, and it did not</u>. When it made its findings the Panel ignored the testimony of Earl Moreland and that of Judge McMillan when it erroneously concluded that the evidence against Judge McMillan was clear and convincing.

CHARGE 5

The Hearing Panel concluded, by clear and convincing evidence, that the brochure, to the effect that Manatee County had lost millions in unpaid fines and court costs, was a *"knowing attempt at attributing these defects in the collection system to Judge Brown."* This is really weak. To the point that the JQC Report integrity might be questioned even by a non-partisan.

The brochure itself states "Manatee County has lost over $12 million, and victims $10 million, in the last 10 years when fines and court costs have been

reduced at the end of probation." No where in the entire brochure is Judge Brown even mentioned. Thus, no possible argument can be sustained that the brochure gives the impression that the unpaid fines and costs are due to the actions of George Brown. It requires the logic and reasoning of a panel pretty much full of lawyers to find an inference from this brochure that Judge McMillan was referring to George Brown as the sole cause of these millions of shortfall. The Hearing Panel clearly agrees that the brochure does more than attribute the unpaid fines and fees directly to George Brown because it states, in the charge itself, that the brochure also falsely and misleadingly criticizes the "overall failure of the administration of justice in Manatee County." Judge McMillan, under the law, had an absolute right to criticize the overall failure of the administration of justice in Manatee County.

The right of the people to question the administration of their government is protected by the First Amendment. ***Ackerson v. Kentucky Judicial Retirement and Removal Commission***, 776 F. Supp. 309 (W.D Ky 1991), addresses this issue and held:

> "There is no compelling state interest which justifies limiting a judicial Candidate's speech on court administrative issues....Without a compelling state interest to justify it, constraint on Ackerson's

campaign speech on the subject of court administration is an unnecessary abridgement of his First Amendment Rights."

The United States Supreme Court has held that judges and judicial candidates have a right to criticize the administration of justice. In ***Bridges v California***, 314 U.S. 252, 62 S. Ct. 190, 86L.Ed. 192 (1941), the Supreme Court stated:

"The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American Public Opinion. For it is a prized American privilege to speak one's mind...on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion, and contempt much more than it would enhance respect.")Cited with approval In re Complaint Against Judge Harper, 77 Ohio St. 3d 211, 673 N.E.2d 1253 (OH 1996)), "Again, the Canons do not, and should not preclude criticism of the judiciary." Id.

"There is practically universal agreement that a major purpose of ...[the First] Amendment was to protect the free discussion of governmental affairs,...of course...[including] discussions of

candidates." Id. Citing Mills v Alabama, 384 U.S. 214,218 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484, 488 (1966).

Judge McMillan's brochure concerning the amount of unpaid fines and fees in the Manatee County court system is a criticism of the administration of justice in Manatee County. This criticism is permitted and expected in a country that values its right to freedom of speech.

Once again the integrity of the JQC comes into play upon consideration of the Panel's misrepresentation of the record in several regards. On page 25, the Panel implies that Judge McMillan maintained his statements regarding fines and court costs was "*a 'fair statement' because he was told by the 'conspiracy' that he was really running against the entire court system. (T. 170)*" In actuality the statement made on (T. 170) refers to *an entirely different brochure* and an entirely different issue. Furthermore, the Hearing Panel puts the word "conspiracy" in quotes, to suggest that Judge McMillan used that word in his answer; he did not.

On (T. 162 – 3), Judge McMillan explained that

"the statement is correct. We've lost $12 million in our court system in this county for the various practices of whatever judges these refer to...[Judge Brown] is not mentioned anywhere in the brochure...I was

> talking about the criminal justice system general.... I had a better way to do things...So in that respect, yeah, I think I was running against the entire system. I had a better way to do things. I've proven it to be effective... And what happened as a result is the fines and court costs are up dramatically over previous years."

Judge McMillan's point of view was supported by the testimony of Deputy Charlie Britt. When asked if he was frustrated with Judge Brown's failure to assess and collect investigative costs, Britt answered

> "Yes, I was, with him as well as the entire judicial system.... I had never met Mr. McMillan before [his campaign], but talking to him, I got a good feeling that he was honest, sincere and trying to do the right thing. It seemed like he wanted to make a change with the judicial system, which is what..we're all looking for; I think everyone is." (T. 1350-51)

The Panel continued to draw false conclusions by stating on page *26 "the dollar amounts were known to be extremely inaccurate*." What a curious finding: that the dollar amounts "*were <u>known</u> to be*" extremely inaccurate. Known by

whom? By Judge McMillan or someone else? In any event, there is no evidence that the dollar figures were in any way inaccurate, except that they "unquestionably UNDERESTIMATED" the amount of uncollected fines and court costs owed to Manatee County because they did not reflect fines and fees "deleted" from the system, a common practice in Manatee County. (See T. 430, testimony of Terry Turner and Exhibits 78 and 79) . Mr. Turner, Maura Malloy (T.1019), Wes Skinner (T.1006), and Jean Thomas (depo.p.28) testified to the quest for, and accuracy of, candidate McMillan's data. There was no evidence to the contrary.

In support of his criticism of the collection system, Judge McMillan provided overwhelming evidence that his criticisms were justified and his research was correct. See Exhibits 23, 26, 27, 28, 35, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 53, 54, 55, 56, 59, 62, 64, 65, 66, 72, 73, 74, 75, 76, 77, 78, 79, 81 and 82. Judge McMillan expressed his concern that the panel would fail to recognize the tremendous efforts he made to be completely accurate during the campaign.

"…There's a part of me that thinks all the research my wife and I did, ou don't care, you don't believe it, you don't – I can tell you one thing: We made heroic efforts. What you're seeing in here, my garage is full of boxes of records and printouts that we went through one be one. If you take a look, I want you to imagine the amount of a time it took to look at each –- and it's in your materials - -

look at each sentence of every domestic battery, every petty theft case, every prostitution case. We were exhausted." (T. 1211)

CHARGE 6

The experience and work habits of the incumbent are only some of the few areas upon which a candidate for judicial office may campaign. ***In re Baker***, 218 Kan. 2098, 542 P.2d 701 (KS 1975), is a remarkably similar case wherein the following campaign literature was challenged: "Justice delayed is justice denied! Let's put our Courts on a full time status. Robert Baker will be a full time judge." The Baker court held:

> "We are unable to agree that the material violated (Canon 7), or any other part of the Canon. There is a clear exception for pledges of the faithful .. performance of the duties of the office. As we read the material complained of it pledges on behalf of Judge Baker that he will be a full-time judge, that he will work heard to earn his pay, that he will pay prompt attention to the people's business and that he will be considerate of the time of jurors and litigants. These all, we think,

relate to the 'faithful performance' of the duties of judicial office and are in our opinion proper subjects for a judicial candidate's pledge."

The work habits of George Brown are subject to legitimate scrutiny and Judge McMillan's commentary is protected speech under the First Amendment. Legal precedent supports use of issues of this type in a judicial campaign.

"A pledge of increased efficiency and effectiveness such as was made here is aimed at the legitimate interests of the entire electorate. It is one of those pledges permitted as being for the 'faithful performance' of a judge's duties." ***Baker***, supra. As established by legal precedent no judge is immunized from criticism, and an incumbent's work ethic is a legitimate campaign issue. It is undisputed that George Brown spent less time in court than any other administrative judge surveyed. This is information which the electorate had a right to know. It was presented truthfully and accurately to the best of Judge McMillan's ability after presenting George Brown with an opportunity to respond. The electorate is intelligent enough to weigh the language in the brochure "on the bench" and "days off from court" when it read the questioned literature. See, ***In re the Matter of Honorable James Kaiser***, 759 P. 2d 392 (Wash. 1988)

George Brown's Work Ethic

While Judge McMillan did not base his campaign assertions upon rumors, many witnesses, none of whom had any connection with Judge McMillan whatsoever prior to the campaign, were called to testify that the research conducted and the results obtained by the McMillan campaign was indeed consistent with George Brown's reputation. See testimony of Joy Thomas (T.760), Pat Marshall (T.771), Verne Oblisk (T.677). One year, Judge Brown was awarded the "Casper the Friendly Ghost Award" because he had a general reputation of being but a ghost around the courthouse – "of getting done and going home." (T. 1160) This testimony was unrefuted by the JQC Prosecution.

Both Judge McMillan and his wife testified that Paul Sharff, who eventually became a campaign fundraiser for Judge Brown, told them that although George Brown was not liked much by the other judges because he was a lazy judge and not hard-working, he would nonetheless have the support of the entire judiciary and the Good Ole Boy Club in order to ensure that Matt McMillan did not start a trend where sitting judges would be challenged (T. 892, 1220-1225) When asked in his deposition whether he did in fact state this to the McMillans, Mr. Sharff asserted his Fifth Amendment right. (Exhibit 326)

The Rationale Behind the Research

While witnesses testified that Judge Brown's reputation in the community was well-known, Judge McMillan refused to rely upon rumors as a basis for his

campaign literature. After learning that there were no records to document Judge Brown's actual working hours (T. 785), Judge McMillan decided not to approach the issue of whether or not George Brown was actually working, but instead to research whether or not he was spending an adequate amount of time in the courtroom as compared to other judges in comparable positions.

While Judge McMillan acknowledged that he and Judge Brown may have a "bona fide disagreement over his work ethic," Judge McMillan maintained his position that the limited number of hours Judge Brown spent in county court and the exorbitant number of days in which he did not hold court as compared to other judges was a legitimate campaign issue.[1] (T. 150, 145).

The Hearing Panel points out that Judge McMillan neglected to include hours spent performing administrative and other duties, but Judge McMillan testified that the amount of time a county court judge spends doing legal research, reviewing files, and drafting orders and other administrative work is actually de minimus (T. 150). Judge McMillan testified "We were interested in seeing how much time he spent in <u>this</u> court, because I think that directly relates to the results he got sitting in

[1] Judge McMillan did not include early morning advisories (30 to 45 minutes, two weeks per month), but instead focused on the days that George Brown actually held county court because he believes that the bulk of a judge's time should be spent dealing with the offender population with which the electorate has asked him to deal: county court.

this court where, we, the people, elected him to be. So that's what we looked at (T. 147).

Judge McMillan was asked by a panel member to articulate the message he intended to convey in the "Part-Time Problem" brochure and why he chose to criticize George Brown for his "days off from court." Judge McMillan explained that a county judge controls his calendar, and how, to some degree, he can manipulate and minimize the number of trials he holds. Judge Brown continued to schedule his criminal calendar in such a way that every other week was set aside for trials, although, consistently, year after year, most of those trial days went unused.[2] Judge McMillan calculated that Judge Brown reserved 120 days per year for trials, but the records reflected an average of 35 to 40 days actually spent in trial. (T. 236) Thus, he was deliberately left with 80 some odd days where no court was held (excluding advisories) and an extraordinary amount of time on his hands –

> "an extraordinary amount of time to help people, to be creative and to be innovative, just – if nothing else, just to bring people back in front of the court [i.e. status conferences, compliance court] and either pat them on the back or give them a stern talking to. I think the public

[2] Exhibit 252 is a memo from Judge McMillan to Judge Gallen dated 8/3/99 suggesting the judges' calendars be restructured so that so that the number of unused days reserved for trials could be reduced.

needs that. I think that this city, think this county needs somebody to do that.

"We have – I think we just have a crisis in our country with our young people. And it starts at home. And so every opportunity somebody stands in front of the podium is an opportunity lost if we don't do something.

"My message was that George didn't – wasn't willing to do that, and he had a lot of free time on his hands and that he could have done that….

"I pointed out that he had the days off from court because it … demonstrated that he had ample days during the year to do these things that I've done and to make a difference that I've made. "It wasn't – it wasn't to portray him not being at work; it was to portray that he had ample time [to do similar things]…Why didn't he do them. (T. 1400-1403)

"[Since Judge Brown has never held court on Friday during his trial week,] I knew that I could take that Friday, devote it to a day in court, create a restitution and compliance court one Friday and collections court for the other Friday, the two Fridays a month. I knew it would never interfere with anything…So the point I was trying

to make is he had time to do things that should have been done and I think were incumbent upon him morally – I don't think George Brown is a bad man, I think, his priorities were elsewhere. And I think the citizens of this county deserve to have a judge whose priorities are right here." (T. 237)

The Research

Judge McMillan took great pains to verify the number of hours George Brown spent in court. The amount of research involved was enormous. The hearing panel would have this Court believe Judge McMillan and his staff spent close to one thousand hours researching and documenting George Brown's and other judges' time in court so that he could 1) misrepresent the actual figures obtained through the research to the public, 2) deceive the public into believing that all judges except George Brown spend 100 percent of their time in the courtroom, and 3) convey to the public that the time George Brown did not spend in court was actually vacation time. Each conclusion is entirely disputed by the evidence.

A. Accuracy

Testimony of Mr. Michael Mears: Mr. Michael Mears, a retired superintendent of operations for Florida Power and Light, was one of the court researchers who reviewed the records and documented these hours. Mr. Mears

testified that at no time did Ms. McMillan indicate or suggest that he should be anything other than complete, truthful and accurate in his research, and he thought she was conscientious in her efforts to obtain complete, truthful and accurate results. (T. 696) The similar testimony of Michael Bloski was stipulated into evidence, as was that of Ms. Linda Remley, who conducted a statewide survey, and Ms. Leslie Bock, who typed the hand-written hours submitted by the court researchers into the computer to generate Exhibits 7 through 10. (T. 986)

Mike Mear's Letter: When asked by one of the panel members if he made any inquiry into whether there might be other records for Judge Brown he should review in order to ensure his research was correct, Mr. Mears testified that he agreed to have his signature affixed to a letter sent to Judge Brown requesting information or suggestions as to what other avenues were open to obtain information on his time in court. (T. 706) Exhibit 6 is the letter sent to George Brown dated July 15, 1998, six weeks before the election and well before the publication of Judge McMillan's campaign literature. The letter specifically asks Judge Brown to tell the campaign such things as where they can find additional information regarding time he has spent substituting for circuit or civil judges. The letter closes with "if you should decide to submit the requested information, we will be happy to take these extra hours into account and average them in with our

documented figures." Mr. Mears testifies that to his knowledge, Judge Brown never responded to the letter.

Independent Verification: To further assure the accuracy of these records in preparation for his final hearing, Judge McMillan procured the services of a systems analyst with expertise in accounting and auditing by the name of Jean Thomas from New Jersey to come to Florida to review the work of the court researchers by cross-referencing Exhibits 7 through 10 to the actual dockets, re-doing the math, and testifying as to the accuracy of the records. Deposition of Ms. Thomas , Exhibit 237.

Testimony of Susan McMillan: Susan McMillan, who chaired the campaign research committee, testified regarding their intention of accuracy as follows: "[A change was made to the material] every time there was even a question that something was incorrect – I was getting on people's nerves. I was so set on having this accurate and correct that our campaign guy [Tom Nolan] that did the advertising got upset with me because I would say, 'Look, it's off by an hour,' you know – or 'You have to change it so that it reads this way.' We wanted to be exactly accurate. And every time there was a mistake, we went to great lengths to change it, every single time." (803, 804).

Testimony of Tom Nolan: Mr. Tom Nolan is a paid political and media consultant with extensive experience running campaigns, including eight judicial

races. When asked if Mr. or Mrs. McMillan had in any way attempted sleight of hand or tried to present an unfair or improper picture of either themselves or Judge Brown, Mr. Nolan replied "Exactly the opposite of that. I thought they were extremely diligent in how they went about things. I thought they were sometimes aggravating to the point that I felt they went overboard in some of the things they did in trying to make sure what they did was right and that it was correct and could be substantiated. …[If information came to their attention that put into question the accuracy of the published material] sometimes as late as almost midnight, they would call and tell me they needed to change something." When asked if, during the seven months he worked on their campaign, Matt McMillan ever knowingly misrepresented, misled or attempted to do so in connection with this election, Mr. Nolan emphatically replied "No." (T. 1039-1042)

B. The Comparison to Other Judges: The Hearing Panel ignores the substantial evidence regarding Judge Brown's time spent in court in relation to other judges in comparable positions statewide, measured by the same criteria as Judge Brown, and in doing so, misportrays Judge McMillan's intentions. Judge McMillan's position was never that George Brown was taking excessive vacations. His criticisms of George Brown's work ethic was always in comparison to other judges, and this can be proven by examining seven pieces of evidence. (T. 797, 798, 705, 802, Exhibit 13, 15).

Bradenton Herald Rebuttal: JQC Exhibit 9 is Judge McMillan's rebuttal to the Bradenton Herald editorial which endorsed his opponent. Judge McMillan's original version was edited by Tom Nolan and then faxed directly to the Bradenton Herald. What is important to note is that here again, in the prosecution's own exhibit, Judge McMillan explains his position with regard to comparing Judge Brown's time in court to other judges: "A survey of other senior county administrative judges across Florida reveals that they spend approximately 75 percent of their time in the courtroom, unlike Judge Brown's 30 percent."

Television Commercial Transcripts and Printing Error: Exhibit 17 is two versions of a television commercial designed to compliment the Part-time Problem flyer which is the basis of this charge: an original/draft version, and a revised/final version. Judge McMillan testified that he instructed his media consultant, Tom Nolan, to remove the "Over-loaded court system" phrase from his campaign materials (T. 142), which would have included both the printed flyer and the television spot. Mr. Nolan testified that he inadvertently failed to comply with Judge McMillan's instruction to remove the phrase from the printed brochure, but he did remove it from the television spot. (T. 1040-1, 1044). As instructed, the revised television spot replaces the "over-loaded court system" phrase with the following: "A survey of county judges show they spend up to 75% of their time in court. Yet Manatee County Judge George Brown averaged only 14 hours a week in

county court over the past two years, " thereby clarifying once again that Judge McMillan was comparing Judge Brown's time in court to that of other judges, not implying that he was on vacation. The Part-time Problem printed brochure was supposed to have the same revision.

Judge McMillan (T.142), Susan McMillan (T. 807) and Tom Nolan (T. 1040-1, 1044) all testified that instructions had been given to change the brochure. Even the Hearing Panel concedes in its findings on page 28 that the brochure was "*an error in the printed materials*" and that Tom Nolan, the paid political consultant, failed to retract the error…*while "the television spot making the same charge was changed*."

C. Findings, Conclusions and Recommendations

A. Excessive Vacations: Each time Judge McMillan refers to his survey and the time spent in court of other judges, he is conveying that no judge spends 100% of their time in court, not that Judge Brown is on vacation. Consequently, with each reference to the survey, (and with each reference to Judge DeVilbiss), he was suggesting to his audience that some time off from court is reasonable for any judge, but Judge Brown's time off from court was excessive.

How does the Hearing Panel in good conscience state to the Court that "*Judge McMillan was clearly attempting to convince voters…that Judge Brown*

took off from work for extended vacation periods. These assertions of excessive vacations were circulated late in the campaign." (p.28, 29) We challenge the prosecution to point out in its response exactly where in the evidence are Judge McMillan's "*assertions of excessive vacations*?" Judge McMillan was asked by the prosecutor if it was his position that Judge Brown took 86 vacation days a year. Judge McMillan replied "No, I don't think that's at all what this implies." (T. 143). Then Judge McMillan is asked if he meant that the voters should understand that Judge Brown was on a "continuing vacation." Again Judge McMillan firmly replies "No."

"*Assertions of excessive vacations*" by Judge McMillan are nonexistent by any stretch of the imagination by anyone who looks beyond the accusations and examines the record; and they are certainly nonexistent using the rule of clear and convincing evidence.

B. "Extremely Helpful Campaign Rhetoric"

1. Tracking Poll: The Panel asserts that "*this campaign rhetoric was extremely helpful to Judge McMillan and extremely hurtful to Judge Brown*." (p. 29) If this issue is not void as speculation on the part of the Panel, then, in any event, the greater weight of the evidence presented showed just the opposite. Exhibit 311, T. 1214-5, 1340-41. Judge McMillan was only able to gain his lead over Judge Brown by good old-fashion knocking on doors. (T. 1340-41)

2. Precinct Analysis by Christopher Carman: The testimony of Christopher Carman, campaign coordinator, statistician, also confirmed that Judge McMillan's Part-time Problem rhetoric was anything but helpful to him. Mr. Carman testified (T. 1340 -1) he mathematically determined, "using a control group of people that only received the advertisements that the media gives out and the newspapers, that those individuals tended to vote for Judge Brown for his reelection." But the precincts where voters were personally contacted by Judge McMillan or his volunteers (door-to-door and phone calls) were the precincts where Judge McMillan won. In other words, had Judge McMillan relied on his campaign literature, TV spots, and media coverage, he would have lost the election. He only won in precincts where he and his volunteers knocked on doors or otherwise made personal contact. Mr. Carman's evidence went undisputed by the prosecution.

Mr. Carman testified Judge McMillan and his citizen volunteers actually knocked on 5600 doors and made another 2000 to 3000 phone calls. (T. 1342) The only piece of literature he and his volunteers gave out was JQC Exhibit #3 (T. 1343). This piece of literature does not mention George Brown and makes no reference whatsoever to his time spent in court or his work ethic. It is also the only piece of literature which had all related charges of impropriety entirely

dismissed by the JQC prosecution and investigative panel in the January 17, 2000 Stipulation. Thus the evidence presented not only fails to support, but contradicts, the Panel's conclusion that "*this campaign rhetoric [with regard to Judge Brown's work ethic-Ed.] was extremely helpful to Judge McMillan and extremely hurtful to Judge Brown*." (p. 29)[3] The only thing that was helpful to Judge McMillan was his grassroots effort and his door-to-door volunteers.

3. Internally Inconsistent Findings: There are two inconsistencies in the Panel's findings which cannot be reconciled. The Panel concedes that "*numerous calendars, court records, charts and statistics were compiled and presented (McMillan Exhibits 7 –12, 14, 15)", and the amount of evidence presented by McMillan was "voluminous."* Still the Panel finds Judge McMillan *made "intentional misrepresentations."* (p. 27) It does not make sense that Judge McMillan would exert an unbelievable amount of effort collecting, compiling, and submitting data, recruit others to assist him and still others to independently confirm the findings, only to intentionally misrepresent his own findings.

Judge McMillan Expresses Remorse: While Judge McMillan took a position during his campaign, believing that his criticisms of George Brown's work

[3] The failure of Judge McMillan's campaign literature to positively affect the outcome of the election does not justify any alleged misconduct, but is relevant in that the Court expressed regret ***In re Alley*** that she appeared to have profited from her misdeeds and felt that a reprimand was too lenient a discipline.

ethic were legitimate and accurate, he also conceded that the "days off from court" language could be misconstrued. To Judge McMillan, days off from Court meant "He didn't hold court those days." (T. 1404). But he conceded that a reasonable person might misinterpret it. (T. 1404)

"I think if you wanted to draw that conclusion, you could. That certainly wasn't our intent." (T. 1404-5).

Panel member Mr. Garcia asked "Why didn't you just say this in literature that Judge Brown sits on the bench less time than other judges?" (T. 1406)

Judge McMillan responded "In retrospect, I wish we had. If it would have cleared up the ambiguity, there's not question that I wish we had. Why would I want to sit here today? Why would I want this question? I thought it was clear at the time." (T. 1406)

He further testified:

"I thought it was clear when we wrote it. You guys have looked at the research, you've looked at all the stuff we did to try to be clear. You've examined and micro-examined this thing to death. Why would we go to all

of this trouble to try to mislead the public? We didn't have to. We didn't need to.

" [W]e made an inartful choice of words, for that I'm very sorry. I'll take responsibility for that. If you think I don't need to be a judge for that, I'll accept it." (T. 1408)

While the Panel discounts the credibility of Judge McMillan's position in its findings, his position seemingly was understood perfectly by at least three panel members, as is evident from their questions on the last day of the trial. Panel Member Ms. Promoff asked the following:

> "Judge McMillan, is it a correct characterization of your testimony in connection with Judge Brown that he actually did the cases and the jobs that were assigned to him but had a significant amount of additional time which he could have used for better uses and instead took off for his own personal use?"
>
> Judge McMillan replies "If you could sum my campaign up, I think you've hit the nail on the head, yes." (T. 1425)

Cognizant of Judge McMillan's remarkable success on the bench, Panel member Judge Feiner asks:

> "Judge McMillan, granted that a lot of the charts and the programs that you've instituted and borrowed from other counties have produced positive results. And granted, they're all innovative and apparently helpful for the court system and the community. Would you agree that had you not been as innovative as you were, that you would have had the same type of time schedule that Judge Brown would have had? (T. 1296-7)

and "…In light of the innovations that you've brought, and the success that you've ultimately had, and your beliefs that they would be successful, did you feel that you could have run the campaign and geared the campaign more on a positive scale to reflect those potential innovations as opposed to what would appear to be a negative campaign against Judge Brown?" (T. 1390)

At least one other panel member, Ms. Bonnie Booth, was sufficiently impressed at the difference in Judge McMillan's work ethic and the remarkable improvements he was able to effect that she him asked the following question:

> "Yes. Judge McMillan, I just – I think you realize that different people have different styles of doing their jobs. And I'm wondering – you know, it's just so commendable. And **I'm just wondering if you expect every judge to be as zealous and as creative and to work as hard and as many hours as you do, or are you always going to be an exception?** (T. 1427) *(emphasis added)*

These comments by panel members are revealing as to the actual evidence that was presented during this trial, and they stand in sharp contrast to the version of the facts as represented in the findings submitted before this Court.

CHARGE 7

The very wording of the brochure in question reflects that it is not a statement of fact. "We hear all the time how overloaded our court system is and it's no wonder with working hours like that."

The propriety of the statement notwithstanding, the record is absolutely clear that Judge McMillan instructed his campaign manager and media consultant, Tom

Nolan to delete this paragraph from the brochure, as well as its matching television spot. The response to the previous charge references numerous citations to the record illustrating Mr. Nolan's admission, Judge McMillan's intent to have the phrase deleted from the brochure, and his regret that Mr. Nolan failed to do so.

Judge McMillan understands that he is ultimately responsible for all of his campaign literature, including the errors made by his staff. "We made some mistakes. It's my fault, because the people that made the mistakes for me, I told them what to do. So I accept responsibility for that." (T. 1293) However, there is a burden of proof that must be met when finding a violation of Canon 7 (A)(3)(d)(iii). It is not only erroneous but illogical for the Panel to first concede that the phrase in question was an error which Judge McMillan attempted to correct, and then conclude by clear and convincing evidence that it was a knowing, intentional misrepresentation on the part of Judge McMillan.

CHARGE 8

The charge designated in subparagraph (i) (relating to domestic battery cases) was dismissed by the Prosecution at the beginning of the hearing. (T. 59)

On September 9, 1999, the chair of the hearing panel entered an order denying Judge McMillan's Motion for a More Definite Statement filed August 25,

1999; accordingly there was no way to determine until the trial how Judge McMillan, according to the *prosecution*, "*misrepresented the incumbent's sentencing practices with respect to prostitution*". The JQC had a legal obligation to identify the alleged misconduct in such a manner that Judge McMillan could prepare a proper defense. The Chair erred in denying Judge McMillan's motion.

Judge McMillan's submission provided to the Bradenton Herald Editorial Board included the following statement: "As a judge, I will see to it that prostitutes and johns are punished in a manner that will ensure they take our justice system seriously. I will enforce the geographical relocation statute, and I will order mandatory treatment and urinalysis when appropriate." In an effort to prepare his defense to this nonspecific charge, Judge McMillan submitted documentation of the sentences of every prostitution case that appeared before Judge Brown during his last three years on the criminal bench, 1994 through 1997. See Exhibits 44-48, 72.

As stated earlier, Judge McMillan hired Wes Skinner, a statistician, who testified that the prostitution graphs represented the actual data (T. 1007), and that results achieved by Judge McMillan could not be disputed mathematically. (T. 1008). There was no testimony or evidence to the contrary.

Undoubtedly Judge McMillan prepared in every way he could think of, both during the campaign and in preparation for trial, to demonstrate that he did not

misrepresent the sentencing practices of his opponent with respect to prostitution cases and that his criticisms were legitimate and accurate.

If the prosecution for the JQC had put Judge McMillan on notice that it was their position that there was a knowing and deliberate false statement regarding the existence of a statute or ordinance governing the geographic displacement of prostitutes rather than the sentencing practice itself, Judge McMillan would have been able to present supporting documentation that led to his misunderstanding, and he would have been able to call as witnesses prosecutors and even a Sarasota judge, who would have testified on the subject.

On or about January 24th, 2001, the Hearing Panel filed a supplement prepared by Judge McMillan immediately after the trial upon learning that the Hearing panel was interested, not in whether or not George Brown had ever enforced a geographic location provision, but whether in fact Judge McMillan actually believed there was a statute or ordinance governing the provision. Upon his post-trial research, Judge McMillan learned that while there was a well-established protocol in place, there was no statute or ordinance. *It was Judge McMillan who informed the hearing panel of this finding.*

With little specificity with which to prepare his defense, there is nevertheless overwhelming evidence that Judge McMillan went to extreme lengths to be diligent, truthful, and accurate in his representation of his opponent's sentencing practices.

CHARGE 9

In a submission to the Bradenton Herald Editorial Board, Judge McMillan stated that Judge Brown had "required no jail time" in sentencing Vincent Born, when in fact, Born had served 55 days in jail prior to his sentencing. Judge McMillan readily admitted that this was a mistake of which he learned 6 or 7 months after the campaign was over and explained the circumstances under which it occurred. (T. 135-7)

Judge McMillan testified that during the campaign, he obtained a printout from the Clerk's Office listing every single domestic violence case in Manatee County from 1994 through 1997 (Exhibit 57) and culled out the ones that George Brown had handled. (T. 136) The sentences on all cases belonging to George Brown were researched and summarized, and are listed in their entirety on Exhibit 20, including each defendant's name, case number, sentence, sentence date, VOP sentence and date if applicable, amount of court costs ordered, and amount paid, if any.

Susan McMillan testified that the results of Exhibit 20, Judge Brown's domestic battery sentences, are summarized in pie chart form on Exhibit 25: 192 offenders of 327 total offenders sentenced by Judge Brown during that time frame did not serve any jail time on their domestic battery sentences, and many had lengthy criminal histories and had caused serious injury in their victims (Exhibits 21

and 24 - detailed case histories of offenders sentenced by Judge Brown), (T. 831-2).

The Panel findings state "*Obviously the words 'credit for time served' indicated that the man had spent some time in jail…Again the Panel concludes that the statements concerning Born constituted a knowing misrepresentation…Judge McMillan was fully aware of county court sentencing practices before he ran for the office*." (p.31)

In reaching this finding, the Panel disregards evidence and misleads this Court with respect to County Court practices in order to justify its unsubstantiated finding of guilt. The fact is "Credit for time served" indicates that the offender was arrested, brought to jail, and in many county court cases very likely bonded out immediately or upon seeing a judge first thing in the morning. It does not necessarily mean that he served any amount of jail time past the day of arrest. Therefore, it would be equally misleading for a judge to claim that he sentenced every defendant to jail time because virtually every defendant is booked into the county jail and is given credit-for-time-served by statute, even if they only spent 15 minutes behind bars. Therefore, it would not be "*obvious" to any person "aware of county court sentencing practices*" that the information obtained from the probation department was incorrect.

The Panel has had occasion to observe and review the voluminous amount of research that Judge McMillan and his staff put into analyzing Judge Brown's domestic battery sentences. The record is clear that Judge McMillan did not have to choose Vincent Born in order to illustrate that it was not uncommon for defendants sentenced by the incumbent to serve no jail time. The eight members of the editorial board who saw this example were not misled as to the actual sentencing practices of George Brown. It would defy logic for Judge McMillan to deliberately choose this defendant as an example when so many other names could have been chosen to make the exact same point. Whether or not the probation department deliberately provided false information is debatable, but the record is clear this was an unintentional error; a simple mistake from which Judge McMillan failed to profit.

Judge McMillan Expresses Remorse:

Judge McMillan's testified "…there are hundreds of people situated just like Vincent Born; that we could have substituted the name, and the proposition was still the same. We made a mistake. We regret that." (T. 136-7) "We made heroic efforts to try to be correct. We made some mistakes. My wife made some mistakes. I'm responsible. And if you remove me because of that, then I'll accept responsibility for that." (T. 1266)

CHARGE 10

This charge stems from Judge McMillan's response to the incumbent's campaign flyer listed as Exhibit 94: Thank you Judge George Brown for Making Criminals Pay Back their Debt to Our Community. The bolded headline inside the flyer reads "Judge Brown has been endorsed by front-line law enforcement for his **tough stance on crime**." *(Emphasis added)* The back cover reads "Handled in excess of 91,000 cases. Presided over in excess of 300 jury trials."

In conjunction with the statistics cited on his brochure, George Brown characterized himself as *Tough on Crime,* apparently using the statistics in the brochure to reinforce this portrayal. Judge McMillan took issue with his opponent's self-characterization and responded with his own brochure, which is the basis of this charge.

The Panel findings state "*The evidence was clear that the 300 requests for jury trials were not related to the 91,000 figure.*" The evidence is far from clear. The flyer is replete with references to criminal court: the incumbent's photograph with Sheriff Wells in front of his patrol car; headline statements such as "Judge Brown has convicted over 5,000 DUI offenders;" and a listing of endorsements which includes local prosecutors, Sheriff Charles B. Wells, the Manatee County Sheriff's Department and the Fraternal Order of Police. Nowhere in the four page

flyer is there any reference to civil matters. Furthermore Judge McMillan testified that he heard George Brown speak at different forums and was left with the impression that the 91,000 cases to which Judge Brown referred were criminal cases (T. 166). Therefore the evidence is clear that it was indeed a reasonable interpretation for Judge McMillan, as well as the public, to assume that the two numbers on the brochure were related, and to conclude that 300 criminal defendants of 91,000 criminal cases had gone to trial before the incumbent.

During his testimony, Judge McMillan was given the opportunity to explain the rationale behind his brochure. First he took issue with the JQC's position that, given his understanding of the statistics, "*he misled the public concerning the effect that negotiated plea agreements have on the number of criminal cases that are actually tried, irrespective of the particular judge that is assigned to a case*." Judge McMillan testified he believes judges are able to control the number of trials they hold to some degree, and can, for example, minimize that number by automatically accepting every plea offer that comes before them. (T. 167, 236). He expanded upon this position in JQC Exhibit 5, the submission to the Bradenton Herald Editorial Board. "I will not rubber stamp the deals the prosecutors and defense attorneys work out... Justice in my courtroom will depend on the nature of the crime and the defendant's criminal history."

He testified "I was drawing on my own experience…I thought the net result [of my intention to not rubber stamp plea deals] might be that [attorneys] would have to try more cases…I wouldn't accept any old plea deal; that I would impose certain conditions or have certain standards about what we're going to do here. I think that's what justice requires of a judge." (T. 1417)

Judge McMillan conceded several times that he wishes he had not made the plea deal statement because he now recognizes it is subject to misinterpretation, but he goes explain that he believes that a judge who accepts, rather than scrutinizes, whatever plea deal comes before him is abdicating his responsibility. (T. 159-160).

Without any evidence to support its position, the Panel finds that charge 10 constituted a knowing misrepresentation by Judge McMillan. The record is clear that Judge McMillan believed his interpretation of his opponent's statistics was correct. There was absolutely no independent evidence presented that refuted Judge McMillan's interpretation, no evidence presented that the public was misled, no evidence presented that he created this flyer with a knowing intent to mislead the public, and no evidence presented that he intended to misrepresent the qualifications of his opponent. Furthermore, even if it could be argued that Judge McMillan's reiteration of the statistics put forth by his opponent "*misled the public concerning the effect that negotiated plea agreements have on the number of*

criminal cases that are actually tried irrespective of the particular judge that is assigned to a case," it takes a leap of logic and a number of improper inferences to conclude by clear and convincing evidence that *therefore " Judge McMillan knowingly misrepresented a fact or qualification of the incumbent.*" Furthermore, the subject matter of this charge takes concentration on an attorney's part to understand what the issue is, meaning that the average voter would be aclueistic.

CHARGE 11

In the case of the 10 charges discussed above, the alleged misconduct primarily was the result of a single activity: Judge McMillan's use of his campaign literature, perhaps even a single document (the brochure re Judge Brown's time spent in court, which the JQC found to be perhaps the most serious issue in the campaign-Charge 6) all of which was generated during a discreet and unique period in time while McMillan was not a judge, but a candidate, i.e., the 1998 judicial campaign. There were not specific major incidents or such an accumulation of small incidents as to indicate a pattern of hostile conduct unbecoming a member of the judiciary. See ***In re McAllister***, 646 So.2d 173 (Fla.1994).

The JQC method of prosecution and fact finding arbitrarily divided up incidents in an effort to show an accumulation of offenses. The police officer letter was divided and stretched into three separate charges:1, 2 ,and 3. Charge 4 stems

from a personal letter to Judge McMillan's former employer, not campaign literature. Charge 5 stems from a piece of campaign literature the panel previously concluded was not improper in the January 17, 2001 Stipulation. Charges 6 and 7 both stem from a single piece of literature stretched into two separate charges, and Charges 8 and 9 both stem from a single document not directed to the voting public. A couple of pieces of literature, only one of which was characterized by the JQC as "serious", all stemming from one particular circumstance, a judicial campaign, generated during a discreet period of time, under extreme, unusual, and highly charged circumstances, have been arbitrarily stretched into 11 charges, deceptively painting a picture of a continuing, deliberate, ongoing pattern of judicial misconduct.

There has been no evidence that Judge McMillan has been hostile or that he has criticized the judiciary since taking the bench. There was ample testimony, however, that Judge McMillan has worked tirelessly to make changes that would bolster the public perception of the judiciary, and that his courtroom demeanor has been exemplary. The judiciary is not immunized from legitimate attacks on its effectiveness. Such attacks do not impair the compelling state interest: the public's perception of the court's objectivity. To rule otherwise would be to abolish the First Amendment right to freedom of speech and to deprive the voters of their right

to make the informed decision to improve their community through the elective process.

Throughout his testimony, Judge McMillan outlined the aspects of the system he believed were failing, and he used court records, memorandas, independently verified charts and graphs, community newsletters, letters of commendation, (Exhibits 231 – 283) and the testimony of others, from attorneys to the family members of defendants, to demonstrate to the panel what he did to correct the system's shortcomings and the success of his efforts. These exhibits, many unsolicited, prove that Judge McMillan's election to the bench actually increased public confidence in the judiciary.

The Hearing Panel is entrusted with not only the issue of guilt or innocence of Judge McMillan, but also with determining the discipline to be recommended to the Court in the event any allegation is sustained. Relevant circumstances surrounding any particular act of misconduct are an integral part of this hearing. ***In re Davey***, 645 So. 2d 398 (Fla. 1994) ("In determining fitness to hold judicial office, this Court looks at the relevant circumstances surrounding each particular act of misconduct."). The Florida Supreme Court has held that personal crisis, the influence of outside acts, and isolated incidents, are all relevant in their decision to discipline a judge if an allegation is sustained. See, ***Davey*** , *supra*,(misconduct was an aberration produced by a highly-charged law firm breakup); ***In re Norris***, 581

So. 2d 578 (Fla. 1991) (judge who drove drunk, discharged a firearm, was acting under a one-time personal crisis.) All evidence and testimony concerning any issues of "highly-charged' situations, personal crisis, or other mitigation must be given due consideration.

It should be noted that the evidence of the "Conspiracy" was such that the JQC was compelled to state that it was "unnecessary to decide whether clear and convincing evidence showed a conspiracy" (p.16). The Panel strongly implied the existence of it and the condemned it in their findings. The panel noted …" [I]t is also something that cannot be justified by this body or by the judiciary and officials of the local community… the local judiciary must recognize the apparent perception of this problem." (p. 14-16)

Although the Panel found "much of this evidence to be irrelevant" (p.14), it is difficult to imagine how even the strain of a "highly-charged law firm break up" ***(In re Davey***) could surpass the level of pressure and stress that Judge McMillan endured. Although Judge McMillan does not seek to justify an improper action by blaming others, consideration should nevertheless be given to the mitigating circumstances that arose from an atmosphere where his home, his wife, his children and their livelihood were under constant assault.

THE OCURA MATTER

The JQC charged Judge McMillan with a violation of Canon 1, Canon 2A, Canon 3B(1), and Canon 3(E) of the Code of Judicial Conduct. Judge McMillan did not contest that his conduct could be construed as a violation of the Canons. (T.189, 190) It is the JQC's characterization of Judge McMillan's candor and sinister intent in handling the first appearance that Judge McMillan contests.

Judge McMillan observed Mr. Ocura's vehicle being driven erratically on the early evening hours of Sunday, January 30, 2000. Judge McMillan, with his wife and children, became concerned for the safety of those sharing the road with Mr. Ocura and telephoned the Florida Highway patrol. Ocura was stopped and Judge McMillan provided a short witness statement as to what he had observed and then left the scene. (T.178)

The next day, Monday, January 31, Judge McMillan arrived at work early as usual and set about his duties. Judge McMillan testified that he passed the video conference room, which is located just a few steps away from his office. He testified that the door was open and he observed Valerie Rosas, the clerk in the room preparing for the hearings to start. He stopped to say hello and in the course of the conversation, mentioned that a person he had reported to the police the prior evening might be on the docket. Judge McMillan inquired of Ms. Rosas what Ocura's blood alcohol level was. It was in excess of .30, nearly four times the legal

limit. Judge McMillan testified that he was leaving the room when he encountered Judge Farrance at the doorway. (T. 181, 6B Hearing transcript)

Judge Farrance was a newly appointed judge to the county court (T. 210), and had been on the bench less than a month. Judge McMillan testified that Judge Farrance was not around during the campaign and that he had been friendly toward Judge McMillan every time they had interacted. Judge McMillan had hoped to ingratiate himself to Judge Farrance and have a friend and an ally in an environment that was openly hostile toward him (T. 210).

Judge McMillan had covered Judge Farrance's calendar call the prior Friday, since Judge Farrance had been away at Judicial College. Judge McMillan testified that when he encountered Judge Farrance, Judge Farrance inquired of Judge McMillan as to how many jury trials Judge Farrance could expect that morning. Judge McMillan realized that this was Judge Farrance's first jury trial week as a judge and inquired of Judge Farrance as to whether he was ready. It was during this conversation that Judge McMillan observed that Judge Farrance had not contemplated jury instructions, so Judge McMillan asked Farrance if he would like for him to cover first appearances so that he could prepare himself for the jury trials. (T.209-213)

Judge Farrance took Judge McMillan's offer and Judge McMillan proceeded to handle the docket. When Mr. Ocura was called, Judge McMillan immediately

notified everyone in the room of the conflict. He told Mr. Ocura (whose bond was $500.00 less than the schedule bond required)(T.187) “Mr. Ocura, I’m the guy that was behind you in the car that called the police, so I’m probably not a good person to address the issue of your bond..**So I’m going to have you come back in front of another judge in 24 hours**.” (Ocura Exhibits 14,15,16)

Steve Viana, the assistant state attorney handling the docket, testified that Mr. Ocura had an “extreme record of prior offenses,” and this he was “absolutely” interested in having Judge McMillan know. After Judge McMillan passed on the case, Mr. Viana informed the Court that Mr. Ocura had as many as five prior DUI’s. (T.188, 1385)

Judge McMillan then stated “Okay, I’m going to set your bond at $100,000 for now, but I’m going to have **it reviewed by another judge later, tomorrow, okay? And make sure I’m not out of line**. Okay, so we’ll see you tomorrow.” (Ocura Exhibits 14,15,16)

At the moment Mr. Viana interjected, Judge McMillan, who had handled two county court criminal divisions himself his first year on the bench without incident, found himself faced with a unusual dilemma. From his experience as an addictions professional, it appeared to Judge McMillan that Mr. Ocura had a serious alcohol problem. (The elevated blood-alcohol level, which indicates a high tolerance for alcohol attained through regular intoxication, coupled with the numerous priors,

indicate a long history of a progressive disease: alcoholism.) Judge McMillan was torn between his ethical duties to avoid the appearance of a conflict and his ethical duty to protect the citizens of his community from a potentially dangerous offender who would surely bond out if the bond remained at $500. (T. 187-88)

Judge McMillan chose to set Mr. Ocura's bond, but he did not rule on the probable cause (T. 1389). He instead, continued the case for 24 hours to allow another judge to conduct an in-depth review of Ocura's eligibility for a lower bond the next day.(T.188) At the time, he thought he had taken the proper course of action. In only a few seconds, he made the decision he believed had protected Mr. Ocura's right to have a probable cause determination within 72 hours of being arrested, and at the same time protected the citizens of his community. In hindsight, Judge McMillan agrees that he should have been more circumspect in avoiding the appearance of impropriety, and could have taken another course of action. (T.184)

The Panel made a specific finding that Judge McMillan was not candid concerning the Ocura matter and seemed more concerned about the candor issue than what happened at Ocura's advisory hearing. But the Panel decision was , shall we say, vague, in that the finding was that "*To the extent that there was conflicting evidence…the Panel accepts the testimony of Judge Farrance and rejects the testimony of Judge McMillan as lacking in credibility*." (p.35) Since it

was felt necessary to state the acceptance of Judge Farrance's testimony, there obviously was conflicting, but not clear and convincing, evidence. But there was no need for the creation of a strawman issue which then brought into play an issue of candor. Judge McMillan did not contest the fact that he asked Judge Farrance if he would like for him to take his advisory docket. Moreover, when the events of Ocura's advisory hearing are considered, the record itself shows that there was no "Ocura" reason as the basis for taking Judge Farrance's docket. Judge McMillan's motivation for offering to assist Judge Farrance was not to harass Mr. Ocura. If that were his intent, it is inconsistent with the transcript of the advisory hearing. (Ocura Exhibits 14, 15, and 16) Judge McMillan testified :

> "And to imply that I would try to get in there and mess with that guy is disingenuous, because there's nothing that you can point to that says that was my motivation, because it wasn't." (T. 213)

Why would Judge McMillan interject himself into the proceeding only to 1) immediately disclose his conflict and 2) pass the case for 24 hours? The evidence is clear that Judge McMillan did not intend to set Mr. Ocura's bond. His first decision was to pass. He only set the bond <u>after</u> Mr. Viana provided additional information concerning Ocura's four or five offenses. It makes no sense to admit this violation, as he did (T.184,189,190) and lie about at it the same time!

In order to reach their conclusion, the Panel has improperly taken one phrase out of context and ignored the testimony in its entirety. Contrary to the findings, Judge McMillan testified that he was aware that Ocura was on the docket, but that he was focused on other things when he made the offer. The actual suspect testimony reads as follows:

"…I knew that [Mr. Ocura] was on the docket because I just talked about

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minutes prior to that; but when I made the offer to take over, I wasn't contemplating that he was on the docket or that I would have to deal with it. (T. 211)

"When I made the offer to take over First Appearances advisories for Judge Farrance, I wasn't thinking about Ocura. I was thinking about how I could help this person who's a new judge." (T. 212).

ation that took place between Judge Farrance

and I. I had covered his dockets on the week prior, so he started asking me questions. That's how I stopped and talked to him…Quite frankly, by the time I finished with my conversation with Mr. Farrance, I had forgotten all about Mr. Ocura. (T. 181)

Respondent submits that "forgotten" did not really mean "forgotten". Of course he hadn't forgotten Ocura was on the docket if called on to remember that fact. What the Judge obviously meant was that foremost on his mind and a priority was his desire to take the docket for Judge Farrance. The fact that Ocura was on the docket was secondary in that he was not going to be disqualified from doing an entire docket because there was one case he shouldn't handle. He was going to do what he should have, i.e., pass the Ocura case to another judge. But, the problem arose that Ocura was such a menace to the community that Judge McMillan felt compelled to impose a bond to be reviewed the next day by another judge. He should not have handled the bond. He should have had another judge deal with the case the same day. But at least we see from the record that Judge McMillan had no improper motive to take the docket just because Ocura was on it.

To further bolster their point that Judge McMillan was "aware" that Ocura was on the first appearance docket, the Panel states that: "*Even if Judge McMillan's motive was a desire to help Mr. Ocura with his presumed alcoholism, motivation simply cannot excuse the conduct or the untruthfulness"* There was no testimony that Judge McMillan was motivated by his desire to help Mr. Ocura. Judge McMillan did not know that Mr. Ocura had an alcohol problem when he offered to assist Judge Farrance. Judge McMillan only learned of Ocura's extensive record from the Assistant State Attorney during Ocura's advisory hearing. Even

Judge Farrance testified that he did not think it was unusual for Judge McMillan to offer to assist him. (T.500). Judge McMillan's testimony that when he made the offer to Judge Farrance, he was not focused on Mr. Ocura, but was focused on other things, namely the opportunity to do a favor for the newly elected judge in the hopes of forging a friendship, is without contradiction. It is inconceivable that the Panel could decide, by clear and convincing evidence, what Judge McMillan was or was not thinking. The record speaks for itself. The JQC cannot make an assumption with no supporting factual basis.

The Panel's reliance on the ***Davey*** case is misplaced. In ***Davey***, this Court set forth a three-prong test which must be satisfied before the JQC can use lack of candor as a basis to find unfitness to hold office. This Court did so because "of the subjective nature of such a finding and its serious consequences". ***Davey*** , at 406. First, the lack of candor must be formally charged. Secondly, the commission must make particularized findings. And thirdly, the lack of candor must be knowing and willful and must concern a material issue in the case.

The JQC charged that Judge McMillan should have been more circumspect, which Judge McMillan acknowledges. Judge McMillan was neither charged with knowingly interjecting himself into a case, nor with lack of candor, and it was not proven that he did so. The Panel has failed the ***Davey*** test. The Panel cannot charge lack of candor simply because they do not believe the Judge. If the Panel

could do so, the Judge is in the unenviable position of risking being found to be untruthful every time the JQC makes a finding of misconduct .[4] See***, Florida Board of Bar Examiners re G.J.G.***, 709 So.2d 1377 (Fla. 1998).

The Panel's reliance on ***Davey*** in its findings is misplaced in that they read the case as giving the JQC "permission" to find lack of candor if they "particularize" their findings. However, this Court's concern was the procedural due process rights of the judge to notice of the charges along with the opportunity to respond and defend. ***Davey*** requires all three prongs of the test to be satisfied, not just the "particularized findings" prong, as the JQC would assert.

Judge McMillan has expressed his remorse concerning the Ocura matter. He agrees that this incident could erode public confidence in the judiciary, and he has taken steps to assure that he never repeats the same type of mistake. He was candid and forthright in his testimony before the panel, but the Panel has drawn inferences inconsistent with the video tape transcript of the Ocura hearing and has reached conclusions inconsistent with the rule of law as set forth by this Court. The Ocura incident was an aberration in the overall exceptional performance of a

[4] Relying on this logic, a judge could punish a witness or litigant with contempt every time the judge did not believe the witness or litigant, or when the judge found another witness' testimony more compelling. Likewise, in every criminal case in which the defendant testified and was found guilty, a judge could summarily punish the defendant for contempt.

first year judge, who by Mr. Barkin's own admission, was "living under a microscope at the time (T. 190).

Present unfitness has not been shown. The real thrust of the JQC proceeding is not present unfitness, since the overwhelming evidence ascribes as to Judge (as opposed to candidate) McMillan descriptions which include: "remarkably consistent in following the law (T. 1365); courteous, approachable, patient with prosecutors, defense attorneys, defendants and victims (1372); diligent and unusual in that he conducted "a considerable amount of his own legal research" and wrote his own legal opinions for the attorneys to review (T. 1373); "no concerns about his impartiality" (T. 1377); has an appropriate handle and understanding of the law and applies it faithfully and fairly to all that come before him (T. 1378) . The prosecution was unable to impeach the testimony of any of these witnesses and was unable to produce a single witness who had practiced in front of Judge McMillan or observed him in court to testify that he was unfit. Judge McMillan's fitness witnesses include: representatives from the State Attorneys Office, the Public Defenders Office, the Private Attorney sector, the Clerk's office, the County Probation Department, the citizen population and even one JQC prosecution witness. (See witness testimony at T. 663, 1126, 1301,1313,1366,1371,1377,1386, Ex.181, Ex 188, Ex 274, Ex 278). Why did this hearing Panel disregard this extensive evidence of fitness and honor? Why did the hearing Panel instead

represent to this Court that the evidence is clear and convincing that this Judge, who citizens of this community call upon other judges to emulate, who has restored his community's faith in the local justice system, who has had such a positive impact in such a short time, and who has restored public confidence in the judiciary in his jurisdiction, is presently unfit to hold office?

The apparent purpose for removal is to deprive the Judge personally of benefits because of campaign misconduct. This punishment necessarily involves a weighing and speculation as to the campaign literature, primarily one brochure, vis a vis the outcome of the election.

Canon 7 of the Code of Judicial Conduct applies to candidates. The initial Notice of Formal Charges served upon Judge McMillan for the alleged violations of the Judicial Canons for the 1998 campaign contain allegations that Judge McMillan violated Canons One through Three of the Code of Judicial Conduct. It is clear, from the plain language of Canons One through Three do not apply to candidates.

Notwithstanding the previous rulings of this Court, it should be borne in mind that Canon 7 may, as Respondent herein must contend, be unconstitutionally applied. In striking down as unconstitutional very similar language as that found in Canon 7 of the Florida Code of Judicial Conduct, the United States Court of Appeals for the Seventh Circuit stated that:

"the principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech. Beyond that valuable generality the cases do not provide much guidance, but they certainly do not support the proposition that to prevent the slightest danger of judicial candidates' making statements that might be interpreted as commitments a state is free to circumscribe their freedom of speech by a rule so sweeping that only complete silence would comply with a literal, which is also so far as appears the intended and the reasonable, interpretation of the rule." ***Buckley v. Illinois Judicial Inquiry Bd.***, 997 F.2d 224, 231 (7th Cir. 1993). (emphasis added)

'[G]overnmental regulations that " 'suppress, disadvantage, or impose differential burdens upon speech because of its content' " are subjected to the " 'most exacting scrutiny' " and thereby must be narrowly tailored to a compelling state interest. ***Day v. Holahan***, 34 F.3d 1356, 1361 (8th Cir.1994) (quoting ***Turner Broad. Sys., Inc. v. Federal Communications Comm'n***, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)).

The United States Supreme Court has held that "in cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' ***" Bose Corp. v. Consumers Union of United States, Inc.***, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (quoting ***New York Times Co. v. Sullivan***, 376 U.S. 254, 284-286, 84 S.Ct. 710, 728-729, 11 L.Ed.2d 686 (1964)). "[E]rroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive,' " ***New York Times Co. v. Sullivan***, supra, quoting ***NAACP v. Button***, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). These precepts, along with the JQC's burden of proving the charges against Judge McMillan by "clear and convincing evidence" require this Honorable Court to carefully discharge its duty to make an independent review of the record . Judges "should not be subjected to the extreme discipline of removal except in instances where it is free from doubt that they intentionally committed serious and grievous wrongs of a clearly unredeeming nature." ***In re LaMotte***, 341 So.2d 513, 517 (Fla. 1977).

CONCLUSION

Judge McMillan respectfully requests this Honorable Court to reject the recommendations of the Judicial Qualifications Commission. The public has entrusted this Court to make a wise and legal decision in this case. This Court has a mandate to independently review the record to ascertain that it supports the findings, conclusions, and recommendations. Removal is a harsh remedy. It should not be undertaken lightly. When considering a request from the Judicial Qualifications Commission to remove a judge from office, the Court has the delicate responsibility of balancing competing considerations. The Court has a responsibility to protect and preserve the integrity of the judiciary either by subjecting to "appropriate discipline" a judge who has violated the Code of Judicial Conduct or by removing from office a judge who demonstrates "a present unfitness to hold office." Art. V, § 12(c)(1), Fla. Const. There has been no showing of Respondent's present unfitness to hold office.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery to Marvin E. Barkin, Esq., 101 E. Kennedy Blvd., Suite 2700, Tampa, FL 33602, via Federal Express to John Beranek, Esq., 227 S. Calhoun St., Tallahassee, FL 32301, via hand delivery to Thomas C. McDonald, Jr., 100 N. Tampa Street, Suite 2100, Tampa, FL 33602, via hand delivery to Scott

Tozian, Esq. 109 N. Brush St., #150, Tampa, FL 33602, via hand delivery to Lance C. Scriven, Esq., 633 N. Franklin St., Suite 600, Tampa, FL 33602 via Federal Express to Brooke Kennerly, Florida Judicial Qualifications Commission, Room 102, The Historic Capitol, Tallahassee, FL 32399 and via Federal Express

to the Florida Supreme Court, Supreme Court Clerk's Office, 500 S. Duval Street, Tallahassee, FL 32399-1927, this ____ day of February, 2001.

LEVINE, HIRSCH, SEGALL & BRENNAN, P.A.

By:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the Brief complies with the font requirements of Rule 9.210, Fl.R.App.P. The font used in this matter is Times New Roman 14.

Arnold D. Levine, Esquire